

EXHIBIT 17

CM-110

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):

William J. Goines #61290; Jeremy A. Meier, #139849
 Greenberg Traurig, LLP
 1900 University Ave., 5th Fl.
 East Palo Alto, CA 94303

TELEPHONE NO.: (650) 328-8500

FAX NO. (Optional): (650) 328-8508

MAIL ADDRESS (Optional):

ATTORNEY FOR (Name): Defendants Polo Ralph Lauren Corporation, et al.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Francisco

STREET ADDRESS: 400 McAllister St., Rm. 103

MAILING ADDRESS:

CITY AND ZIP CODE: San Francisco, CA 94102

BRANCH NAME:

PLAINTIFF/PETITIONER: Ann Otsuka, et al.

DEFENDANT/RESPONDENT: Polo Ralph Lauren Corporation, et al.

CASE MANAGEMENT STATEMENT

(Check one): ☒ UNLIMITED CASE ☐ LIMITED CASE
 (Amount demanded exceeds \$25,000) (Amount demanded is \$25,000 or less)

CASE NUMBER:
 CGC-06-452655

CASE MANAGEMENT CONFERENCE is scheduled as follows:

date: October 27, 2006 Time: 9:00 a.m. Dept.: 212 Div.: Room:

address of court (if different from the address above):

INSTRUCTIONS: All applicable boxes must be checked, and the specified information must be provided.

Party or parties (answer one):

- a. ☐ This statement is submitted by party (name):
- b. ☒ This statement is submitted jointly by parties (names): Defendants Polo Ralph Lauren Corporation; Polo Retail, LLC; Fashions Outlet of America, Inc.; and Polo Retail Corporation

BY FAX

Complaint and cross-complaint (to be answered by plaintiffs and cross-complainants only)

- a. The complaint was filed on (date):
- b. ☐ The cross-complaint, if any, was filed on (date):

Service (to be answered by plaintiffs and cross-complainants only)

- a. ☐ All parties named in the complaint and cross-complaint have been served, or have appeared, or have been dismissed.
- b. ☐ The following parties named in the complaint or cross-complaint
- (1) ☐ have not been served (specify names and explain why not):
 - (2) ☐ have been served but have not appeared and have not been dismissed (specify names):
 - (3) ☐ have had a default entered against them (specify names):
- c. ☐ The following additional parties may be added (specify names, nature of involvement in case, and the date by which they may be served):

Description of case

- a. Type of case in ☒ complaint ☐ cross-complaint (describe, including causes of action):
 Class Action Complaint for Fraud, False Imprisonment, Willful Violations of Labor Code sections 510, 204, 201, 202 and 203 for failure to pay wages earned, willful failure to provide rest periods willful violations of Labor Code sections 221, 226 and 232, violations of Business and Professions Code 17200, et seq., Breach of Contract, Unjust Enrichment and Declaratory Relief.

PLAINTIFF/PETITIONER: Otsuka, et al.	CASE NUMBER:
DEFENDANT/RESPONDENT:	CGC-06-452655

4. b. Provide a brief statement of the case, including any damages. *(If personal injury damages are sought, specify the injury and damages claimed, including medical expenses to date [indicate source and amount], estimated future medical expenses, lost earnings to date, and estimated future lost earnings. If equitable relief is sought, describe the nature of the relief.)*
 Plaintiffs were employees of Defendants Polo Ralph Lauren Corporation; Polo Retail, LLC; Fashions Outlet of America, Inc.; and/or Polo Retail Corporation and functioned as retail salespersons. Plaintiffs have filed a First Amended Class Action Complaint for various employment-related claims and wage and hour violations, including breach of contract, fraud, false imprisonment and seek remedies for failure to pay overtime, failure to provide rest and break periods, and failure to make employment records readily available. Plaintiffs have also filed causes of action seeking recovery for declaratory relief, violations of California Business & Professions Code 17200, et seq., and recovery under the Private Attorney General Act. The Complaint seeks an unspecified amount of damages on behalf of the individual and putative class plaintiffs.

☐ *(If more space is needed, check this box and attach a page designated as Attachment 4b.)*

5. Jury or nonjury trial

The party or parties request ☒ a jury trial ☐ a nonjury trial *(if more than one party, provide the name of each party requesting a jury trial):*

6. Trial date

- a. ☐ The trial has been set for (date):
 b. ☒ No trial date has been set. This case will be ready for trial within 12 months of the date of the filing of the complaint *(if not, explain):* This is a complex wage and employment putative class action case with extensive discovery and class certification motions to be accomplished prior to trial setting. Written and oral discovery can be expected to take place over the next twelve months.
 c. Dates on which parties or attorneys will not be available for trial *(specify dates and explain reasons for unavailability):*

7. Estimated length of trial

The party or parties estimate that the trial will take *(check one):*

- a. ☒ days *(specify number):* 4 - 6 weeks
 b. ☐ hours *(short causes) (specify):*

8. Trial representation *(to be answered for each party)*

The party or parties will be represented at trial ☒ by the attorney or party listed in the caption ☐ by the following:

- a. Attorney:
 b. Firm:
 c. Address:
 d. Telephone number:
 e. Fax number:
 f. E-mail address:
 g. Party represented:

☒ Additional representation is described in Attachment 8.

9. Preference

☐ This case is entitled to preference *(specify code section):*

10. Alternative Dispute Resolution (ADR)

- a. Counsel ☐ has ☐ has not provided the ADR information package identified in rule 201.9 to the client and has reviewed ADR options with the client.
 b. ☐ All parties have agreed to a form of ADR. ADR will be completed by (date):
 c. ☐ The case has gone to an ADR process *(indicate status):*

PLAINTIFF/PETITIONER: Otsuka, et al.	CASE NUMBER: CGC-06-452655
DEFENDANT/RESPONDENT: Polo Ralph Lauren Corporation, et al.	

10. d. The party or parties are willing to participate in (check all that apply):
- (1) ☐ Mediation
 - (2) ☐ Nonbinding judicial arbitration under Code of Civil Procedure section 1141.12 (discovery to close 15 days before arbitration under Cal. Rules of Court, rule 1612)
 - (3) ☐ Nonbinding judicial arbitration under Code of Civil Procedure section 1141.12 (discovery to remain open until 30 days before trial; order required under Cal. Rules of Court, rule 1612)
 - (4) ☐ Binding judicial arbitration
 - (5) ☐ Binding private arbitration
 - (6) ☐ Neutral case evaluation
 - (7) ☒ Other (specify): It is premature to select an ADR process prior to completing initial discovery and document and fact analysis.
- e. ☐ This matter is subject to mandatory judicial arbitration because the amount in controversy does not exceed the statutory limit.
- f. ☐ Plaintiff elects to refer this case to judicial arbitration and agrees to limit recovery to the amount specified in Code of Civil Procedure section 1141.11.
- g. ☐ This case is exempt from judicial arbitration under rule 1601 (b) of the California Rules of Court (specify exemption):
11. Settlement conference
- ☐ The party or parties are willing to participate in an early settlement conference (specify when):
12. Insurance
- a. ☒ Insurance carrier, if any, for party filing this statement (name): Axis U.S. Insurance
- b. Reservation of rights: ☐ Yes ☐ No
- c. ☒ Coverage issues will significantly affect resolution of this case (explain):
Reservation of rights is unknown. We are still investigating whether and to what extent there is coverage for any of the claims alleged in the First Amended Complaint.
13. Jurisdiction
- Indicate any matters that may affect the court's jurisdiction or processing of this case, and describe the status.
- ☐ Bankruptcy ☐ Other (specify):
- Status:
14. Related cases, consolidation, and coordination
- a. ☐ There are companion, underlying, or related cases.
- (1) Name of case:
 - (2) Name of court:
 - (3) Case number:
 - (4) Status:
- ☐ Additional cases are described in Attachment 14a.
- b. ☐ A motion to ☐ consolidate ☐ coordinate will be filed by (name party):
15. Bifurcation
- ☐ The party or parties intend to file a motion for an order bifurcating, severing, or coordinating the following issues or causes of action (specify moving party, type of motion, and reasons):
16. Other motions
- ☒ The party or parties expect to file the following motions before trial (specify moving party, type of motion, and issues):
An Application for Approval of Complex Litigation Designation was filed on 9/18/06. Defendants reserve the right to file such motions as may be deemed necessary and appropriate during the course of this litigation, including but not limited to demurrers, motion(s) for summary judgment and motions related to discovery, including but not limited to motion(s) for protective orders.

PLAINTIFF/PETITIONER: Otsuka	CASE NUMBER:
DEFENDANT/RESPONDENT: Polo Ralph Lauren Corporation, et al.	CGC-06-452655

17. Discovery

- a. ☐ The party or parties have completed all discovery.
- b. ☒ The following discovery will be completed by the date specified (*describe all anticipated discovery*):

Party	Description	Date
Defendants	Depositions/Document Requests/ Third Party Depositions/ Interrogatories/Requests for Admission Expert Discovery	December 2007 TBD

- c. ☐ The following discovery issues are anticipated (*specify*):

18. Economic Litigation

- a. ☐ This is a limited civil case (i.e., the amount demanded is \$25,000 or less) and the economic litigation procedures in Code of Civil Procedure sections 90 through 98 will apply to this case.
- b. ☐ This is a limited civil case and a motion to withdraw the case from the economic litigation procedures or for additional discovery will be filed (*if checked, explain specifically why economic litigation procedures relating to discovery or trial should not apply to this case*):

19. Other issues

- ☒ The party or parties request that the following additional matters be considered or determined at the case management conference (*specify*):
Timing of discovery, class certification motion issues and assignment to complex litigation designation

20. Meet and confer

- a. ☐ The party or parties have met and conferred with all parties on all subjects required by rule 212 of the California Rules of Court (*if not, explain*):
- b. After meeting and conferring as required by rule 212 of the California Rules of Court, the parties agree on the following (*specify*): Following hearing on the demurrer, develop a discovery plan.

21. Case management orders

Previous case management orders in this case are (*check one*): ☒ none ☐ attached as Attachment 21.

22. Total number of pages attached (*if any*): 0

I am completely familiar with this case and will be fully prepared to discuss the status of discovery and ADR, as well as other issues raised by this statement, and will possess the authority to enter into stipulations on these issues at the time of the case management conference, including the written authority of the party where required.

Date: October 12, 2006

William J. Goines

(TYPE OR PRINT NAME)



(SIGNATURE OF PARTY OR ATTORNEY)



(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY)

☐ Additional signatures are attached

Otsuka, et al. v. Polo Ralph Lauren Corporation, et al.

Case No. CGC-06-452655

PROOF OF SERVICE

I, Cathy Sandifer, am a citizen of the United States, over the age of eighteen years and not a party to the within action. I am an employee of GREENBERG TRAURIG, LLP, and my business address is 1900 University Avenue, Fifth Floor, East Palo Alto, CA 94303. On October 12, 2006, I served the following documents:

CASE MANAGEMENT STATEMENT

☒ by transmitting via **FACSIMILE** the document(s) listed above to the fax numbers) set forth below, or as stated on the attached service list, on this date at approximately _____, from the sending facsimile machine telephone number of 650-289-7893. The transmission was reported as complete and without error by the machine. Pursuant to California Rules of Court, Rule 2008(e)(4), I caused the machine to print a transmission record of the transmission, a copy of which is attached to the original of this declaration. The transmission report was properly issued by the transmitting facsimile machine.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the **UNITED STATES MAIL** at East Palo Alto, California, addressed as set forth below.

☐ by **OVERNIGHT MAIL** by placing the document(s) listed above in a sealed overnight mail envelope with postage thereon fully prepaid, addressed as set forth below. I am aware that on motion of the party served, service is presumed invalid if delivery by Federal Express is more than one day after date of deposit with Federal Express.

☐ **(BY MESSENGER PERSONAL SERVICE)**. I caused delivery of such envelope by hand to the offices of the addressee.

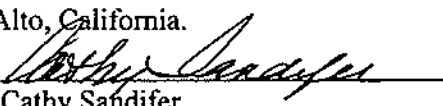
Patrick R. Kitchin, Esq.
Law Offices of Patrick R. Kitchin
565 Commercial St., 4th Fl.
San Francisco, CA 94111
(Fax: 415-627-9076)

Daniel Feder, Esq.
Law Offices of Daniel L. Feder
807 Montgomery St.
San Francisco, CA 94133
(Fax: 415-391-9432)

I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings and notices for mailing with United States Postal Service/Express Mail, Federal Express and other overnight mail services. The foregoing sealed envelope was placed for collection and mailing this date consistent with the ordinary business practice of my place of employment, so that it will be picked up this date with postage thereon fully prepaid at East Palo Alto, California, in the ordinary course of such business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 12, 2006, at East Palo Alto, California.


Cathy Sandifer

Proof of Service

EXHIBIT 18

1 WILLIAM J. GOINES (SBN 061290)
 2 JEREMY A. MEIER (SBN 139849)
 3 KAREN ROSENTHAL (SBN 209419)
 4 ALISHA M. LOUIE (SBN 240863)
 5 GREENBERG TRAURIG, LLP
 6 1900 University Avenue, Fifth Floor
 7 East Palo Alto, California 94303
 Telephone: (650) 328-8500
 Facsimile: (650) 328-8508
 Email: goinesw@gtlaw.com
 meierj@gtlaw.com
 rosenhalk@gtlaw.com
 louiea@gtlaw.com

ENDORSED
 FILED
 San Francisco County Superior Court

OCT 12 2006

GORDON PARKER, Clerk
 BY: ELIAS SUT Deputy Clerk

8 Attorneys for Defendants Polo Ralph Lauren
 9 Corporation; Polo Retail, LLC; Fashions Outlet
 of America, Inc.; and Polo Retail Corporation

10
 11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 12 FOR THE COUNTY OF SAN FRANCISCO

14 ANN OTSUKA, an individual; JANIS KEEFE,
 15 an individual; CORINNE PHIPPS, an
 16 individual; and JUSTIN KISER, an individual;
 and on behalf of all other similarly situated,

17 Plaintiff(s),

18 v.

19 POLO RALPH LAUREN CORPORATION, a
 20 Delaware Corporation; POLO RETAIL, LLC, a
 21 Delaware Corporation; POLO RALPH
 22 LAUREN CORPORATION, a Delaware
 Corporation, doing business in California as
 POLO RETAIL CORP; FASHIONS OUTLET
 OF AMERICA, INC., a Delaware Corporation
 and DOES 1-500, inclusive,

23 Defendant(s)..

Case No. CGC-06-452655

DEMURRER TO FIRST AMENDED
 COMPLAINT

Date: November 15, 2006
 Time: 9:30 a.m.
 Dept.: 301

BY FAX

Date Filed: May 30, 2006

26 Defendants Polo Ralph Lauren Corporation; Polo Retail, LLC; Fashions Outlet of America,
 27 Inc.; and Polo Retail Corporation (collectively referred to herein as "Defendants") hereby demur to

1 the First Amended Complaint ("Complaint") of Plaintiffs Ann Otsuka, an individual; Janis Keefe,
2 an individual; Corinne Phipps, an individual; and Justin Kiser, an individual; and on behalf of all
3 other similarly situated (collectively referred to herein as "Plaintiffs") on the grounds set forth
4 below.

5 1. The First Cause of Action for Fraud fails to state facts sufficient to constitute a
6 cause of action against Defendants under Code of Civil Procedure § 430.10(e). Plaintiffs do not
7 allege facts constituting the alleged fraud with sufficient particularity to withstand demurrer under
8 California law.

9 2. The Second Cause of Action for False Imprisonment fails to state facts sufficient to
10 constitute a cause of action against Defendants under Code of Civil Procedure § 430.10(e).
11 Plaintiffs' cause of action for false imprisonment as to Plaintiffs Otsuka, Phipps and Keefe is time
12 barred under Code of Civil Procedure section 340(c). Additionally, Plaintiffs have failed to
13 properly plead a cause of action for false imprisonment because Plaintiffs consented to the
14 inspections. Finally, Plaintiffs' cause of action for false imprisonment is barred by the exclusivity
15 provisions of the Workers' Compensation Act, Lab. Code §§ 3600, 3602.

16 3. The Seventh Cause of Action for Willful Failure to Provide Rest Periods (Labor
17 Code §§ 226.7) fails to state facts sufficient to constitute a cause of action against Defendants
18 under Code of Civil Procedure § 430.10(e). Claims by Plaintiffs Otsuka, Phipps and Keefe are
19 time-barred by the one-year statute of limitations set forth in California Code of Civil Procedure §
20 340(a) for actions seeking penalties.

21 4. The Eighth Cause of Action for Willful Violations of Labor Code §§ 226 fails to
22 state facts sufficient to constitute a cause of action against Defendants under Code of Civil
23 Procedure § 430.10(e). Claims by Plaintiffs Otsuka, Phipps and Keefe are time-barred by the one-
24 year statute of limitations set forth in California Code of Civil Procedure § 340(a) for actions
25 seeking penalties.

26 5. The Eleventh Cause of Action for Unjust Enrichment fails to state facts sufficient to
27 constitute a cause of action against Defendants under Code of Civil Procedure § 430.10(e).


1 California courts have determined that unjust enrichment is not a cause of action.

2 6. The Thirteenth Cause of Action for Recovery Under the California Private
3 Attorneys General Act, Labor Code §§ 2699 *et seq.*, fails to state facts sufficient to constitute a
4 cause of action against Defendants under Code of Civil Procedure § 430.10(e). Claims by
5 Plaintiffs Otsuka, Phipps and Keefe are time-barred by the one-year statute of limitations set forth
6 in California Code of Civil Procedure § 340(a) for actions seeking penalties.

7 Said Demurrer will be based on the Notice of Hearing of Defendants' Demurrer to First
8 Amended Complaint, the Demurrer to First Amended Complaint, and the accompanying
9 Memoranda of Points and Authorities in support thereof, the Complaint and other pleadings and
10 papers on file in this action, and on such other and further argument and evidence which may be
11 presented at the hearing on this motion.

12
13 Dated: October 12, 2006

GREENBERG TRAURIG

14
15 By 
16 William J. Goines
17 Jeremy A. Meier
18 Karen Rosenthal
19 Alisha M. Louie

20 Attorneys for Defendants Polo Ralph Lauren
21 Corporation; Polo Retail, LLC; Fashions
22 Outlet of America, Inc.; and Polo Retail
23 Corporation
24
25
26
27
28

Otsuka, et al. v. Polo Ralph Lauren Corporation, et al.

Case No. CGC-06-452655

PROOF OF SERVICE

I, Cathy Sandifer, am a citizen of the United States, over the age of eighteen years and not a party to the within action. I am an employee of GREENBERG TRAURIG, LLP, and my business address is 1900 University Avenue, Fifth Floor, East Palo Alto, CA 94303. On October 12, 2006, I served the following documents:

DEMURRER TO FIRST AMENDED COMPLAINT

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☐ **(BY MESSENGER PERSONAL SERVICE)**. I caused delivery of such envelope by hand to the offices of the addressee.

Patrick R. Kitchin, Esq.
Law Offices of Patrick R. Kitchin
565 Commercial St., 4th Fl.
San Francisco, CA 94111
(Fax: 415-627-9076)

Daniel Feder, Esq.
Law Offices of Daniel L. Feder
807 Montgomery St.
San Francisco, CA 94133
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I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings and notices for mailing with United States Postal Service/Express Mail, Federal Express and other overnight mail services. The foregoing sealed envelope was placed for collection and mailing this date consistent with the ordinary business practice of my place of employment, so that it will be picked up this date with postage thereon fully prepaid at East Palo Alto, California, in the ordinary course of such business.


//

//

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

1
Proof of Service

Executed on October 12, 2006, at East Palo Alto, California.


Cathy Sandifer

WILLIAM J. GOINES (SBN 061290)
 JEREMY A. MEIER (SBN 139849)
 KAREN ROSENTHAL (SBN 209419)
 ALISHA M. LOUIE (SBN 240863)
 GREENBERG TRAURIG, LLP
 1900 University Avenue, Fifth Floor
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 Telephone: (650) 328-8500
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 meierj@gtlaw.com
 rosenhalk@gtlaw.com
 louiea@gtlaw.com

Attorneys for Defendants Polo Ralph Lauren
 Corporation; Polo Retail, LLC; Fashions Outlet
 of America, Inc.; and Polo Retail Corporation

**ENDORSED
 FILED**
 San Francisco County Superior Court

OCT 12 2006

GORDON PARK-LI, Clerk

BY: ELIAS BUTT
 Deputy Clerk

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
 FOR THE COUNTY OF SAN FRANCISCO**

ANN OTSUKA, an individual; JANIS
 KEEFE, an individual; CORINNE PHIPPS,
 an individual; and JUSTIN KISER, an
 individual; and on behalf of all other
 similarly situated,

Plaintiff(s),

v.

POLO RALPH LAUREN CORPORATION,
 a Delaware Corporation; POLO RETAIL,
 LLC, a Delaware Corporation; POLO
 RALPH LAUREN CORPORATION, a
 Delaware Corporation, doing business in
 California as POLO RETAIL CORP;
 FASHIONS OUTLET OF AMERICA, INC.,
 a Delaware Corporation and DOES 1-500,
 inclusive,

Defendant(s)..

Case No. CGC-06-452655

**NOTICE OF HEARING OF
 DEFENDANTS' DEMURRER TO FIRST
 AMENDED COMPLAINT**

Date: November 15, 2006
 Time: 9:30 a.m.
 Dept.: 301

BY FAX

Date Filed: May 30, 2006

TO PLAINTIFFS AND TO THEIR ATTORNEYS OF RECORD:

1 NOTICE IS HEREBY GIVEN that on November 15, 2006 at the hour of 9:30 a.m., or as
2 soon thereafter as this matter may be held in Department 301 of the above-entitled Court located at
3 400 McAllister Street, San Francisco, California, Defendants Polo Ralph Lauren Corporation; Polo
4 Retail, LLC; Fashions Outlet of America, Inc.; and Polo Retail Corporation (collectively referred to
5 herein as "Defendants" or "Polo") will demur to the First Amended Complaint ("Complaint") of
6 Plaintiffs Ann Otsuka, an individual; Janis Keefe, an individual; Corinne Phipps, an individual; and
7 Justin Kiser, an individual; and on behalf of all other similarly situated (collectively referred to
8 herein as "Plaintiffs").

9 Said demurrer will be based on the accompanying Demurrer to First Amended Complaint,
10 Memorandum of Points and Authorities, the Complaint, all other pleadings and files in this matter,
11 and such other and further argument which may be presented at the hearing on this matter.

12 Dated: October 12, 2006

13 GREENBERG TRAURIG

14 By William J. Goines
15 William J. Goines
16 Jeremy A. Meier
17 Karen Rosenthal
18 Alisha M. Louie
19 Attorneys for Defendants Polo Ralph
20 Lauren Corporation; Polo Retail, LLC;
21 Fashions Outlet of America, Inc.; and Polo
22 Retail Corporation
23
24
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28

Otsuka, et al. v. Polo Ralph Lauren Corporation, et al.

Case No. CGC-06-452655

PROOF OF SERVICE

I, Cathy Sandifer, am a citizen of the United States, over the age of eighteen years and not a party to the within action. I am an employee of GREENBERG TRAURIG, LLP, and my business address is 1900 University Avenue, Fifth Floor, East Palo Alto, CA 94303. On October 12, 2006, I served the following documents:

NOTICE OF HEARING OF DEFENDANTS' DEMURRER TO FIRST AMENDED COMPLAINT

- ☐ by transmitting via **FACSIMILE** the document(s) listed above to the fax numbers) set forth below, or as stated on the attached service list, on this date at approximately _____, from the sending facsimile machine telephone number of 650-289-7893. The transmission was reported as complete and without error by the machine. Pursuant to California Rules of Court, Rule 2008(e)(4), I caused the machine to print a transmission record of the transmission, a copy of which is attached to the original of this declaration. The transmission report was properly issued by the transmitting facsimile machine.
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//

//

1 I declare under penalty of perjury under the laws of the State of California that the foregoing is
2 true and correct.

3 Executed on October 12, 2006, at East Palo Alto, California.

4 
Cathy Sandifer

MESSAGE CONFIRMATION

10/12/2006 14:29
ID=GREENBERG TRAURG LLP

DATE	S,R-TIME	DISTANT STATION ID	MODE	PAGES	RESULT	S.C.
10/12	07:01"	415 627 9076	TX	038	OK	0000

10/12/2006 14:21 GREENBERG TRAURG LLP → 321#093800#914156279076# NO.442 0001

**Greenberg
Traurig**

Transmittal Cover Sheet

From: Cathy Sandifer, Secretary to
William J. GoinesTel:
650.289.7862E-Mail:
sandifer@gtlaw.com

To:	Fax No:	Company:	Phone No.:
Patrick R. Kitchin, Esq	(415) 627-9076	Law Offices of Patrick R. Kitchin	(415) 677-9058
Daniel Feder, Esq.	(415) 391-9432	Law Offices of Daniel L. Feder	(415) 391-9476

File No.: 62321-093800

Re: Otsuka, et al. v. Polo Ralph Lauren Corporation, et al.

Date: October 12, 2006

No. Pages: Including Cover Sheet 38

If you do not receive all pages properly, please call the sender.

Notes: Please see the attached Demurrer documents and our Case Management Statement, which were filed this afternoon with the court.

Also sent via: ☐ US Mail ☐ Overnight ☐ Messenger ☐ Email ☒ No Other

The information contained in this transmission is attorney privileged and confidential. It is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone collect and return the original message to us at the address below via the U.S. Postal Service. We will reimburse you for your postage. Thank you.

MESSAGE CONFIRMATION

10/12/2006 16:38
ID=GREENBERG TRAURG LLP

DATE	S.R-TIME	DISTANT STATION ID	MODE	PAGES	RESULT	S.C.
10/12	08'12"	4153919432	TX	038	OK	0000

10/12/2006 16:29 GREENBERG TRAURG LLP → 321#093800#914153919432# NO.451 D001

Greenberg
Traurig

Transmittal Cover Sheet

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File No.: 62321-093800

Re: Otsuka, et al. v. Polo Ralph Lauren Corporation, et al.

Date: October 12, 2006

No. Pages: Including Cover Sheet 38

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

ANN.OTSUKA, an individual; JANIS KEEFE,
an individual; CORINNE PHIPPS, an
individual; and JUSTIN KISER, an individual;
and on behalf of all others similarly situated,

Plaintiffs,

v.

POLO RALPH LAUREN CORPORATION, a
Delaware Corporation; POLO RETAIL, LLC., a
Delaware Corporation; POLO RALPH
LAUREN CORPORATION, a Delaware
Corporation, doing business in California as
POLO RETAIL CORP; FASHIONS OUTLET
OF AMERICA, INC., a Delaware Corporation
and DOES 1-500, inclusive,

Defendants.

Case No. CGC-06-452655

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' DEMURRER TO FIRST
AMENDED COMPLAINT

Date: November 15, 2006
Time: 9:30 a.m.
Dept.: 301

BY FAX

Date Filed: May 30, 2006

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1 **I. INTRODUCTION**

2 Defendants Polo Ralph Lauren Corporation; Polo Retail, LLC; Fashions Outlet of America,
3 Inc., and Polo Retail Corporation (collectively referred to herein as "Polo") hereby demur to the
4 First Amended Complaint ("Complaint") of Plaintiffs Ann Otsuka, an individual, Janis Keefe, an
5 individual, Corinne Phipps, an individual, and Justin Kiser, an individual, and on behalf of all other
6 individuals similarly situated (collectively referred to herein as "Plaintiffs") as follows.

7 Polo demurs to the following causes of action alleged against them in Plaintiffs' Complaint:
8 the First Cause of Action for Fraud, the Second Cause of Action for False Imprisonment, the
9 Seventh Cause of Action for Willful Failure to Provide Rest Periods (as to claims by Plaintiffs
10 Otsuka, Phipps and Keefe), the Eighth Cause of Action for Willful Violations of Labor Code §§
11 226 (as to claims of Plaintiffs Otsuka, Phipps and Keefe), the Eleventh Cause of Action for Unjust
12 Enrichment, and the Thirteenth Cause of Action for Recovery Under the Private Attorneys General
13 Act (as to claims of Plaintiffs Otsuka, Phipps and Keefe). For the reasons discussed in greater
14 detail below, Plaintiffs' Complaint fails to allege facts necessary to establish the elements of those
15 claims and/or allege those facts with the required specificity to withstand demurrer and/or allege
16 the violations within the requisite statutes of limitation periods.

17 Accordingly, Polo's demurrer to each of the above causes of action should be sustained.

18 **II. PLAINTIFFS' FACTUAL ALLEGATIONS**

19 As pled on the face of their Complaint, Plaintiffs base their causes of action for Fraud, False
20 Imprisonment, Willful Failure to Provide Rest Periods, Willful Violations of Labor Code § 226,
21 Unjust Enrichment, and Recovery Under the Private Attorneys General Act on the following
22 factual allegations:

- 23 • Defendants do not provide employees with a base rate of pay as Defendants promise
24 in their Sales Associate Handbook. Complaint, ¶ 13, p. 4. Defendants have
25 established a wage system they call "Base Rate Against Commission," and which
26 they characterize as a bone fide commission based system, when in fact it is not.
27 Defendants' wage system is an illegal scheme designed to avoid the wage rules and
28 overtime regulations. Complaint, ¶ 13, p. 7.
- Defendants falsely promise employees that they will perform an end-of the-year
wage reconciliation to determine which employees are eligible to receive premium
overtime compensation for work performed during the entire course of the previous
year; however, Defendants have failed to do so. Complaint, ¶ 13, pp. 4-5.

- 1 • Defendants represent to all of their employees that they will be permitted to take
2 two 15-minute rest breaks during an eight-hour shift; however, Defendants do not,
in fact, provide employees with rest breaks. Complaint, ¶ 13, pp. 4, 6-7.
- 3 • Defendants routinely require all of their employees to perform work "off the clock"
4 for which they are not paid. Complaint, ¶ 13, p. 5. Defendants routinely
fraudulently manipulate Plaintiffs' time records to keep Defendants' employees
5 from receiving wages for all hours they worked. Complaint, ¶ 13, p. 5.
- 6 • Defendants require employees at the end of their shifts to stand in line and/or
7 remain in their locked stores, for up to one half hour to undergo a loss prevention
search by managers after the employees have clocked out. Complaint, ¶ 13, pp. 5-6.
- 8 • Defendants fail to maintain proper records memorializing the hours worked by their
employees, the compensation paid to them, and the debits made to their wages, and
9 fail to make accurate payroll records available upon request. Complaint, ¶ 13, p. 8.
- 10 • Defendants maintain an illegal and unconscionable charge back or returns policy
11 that permits Defendants to collect from their employees' wages previously paid.
Because Defendants have misclassified their employees as bona fide commissioned
employees, Defendants' application of a commission-based charge back system is
12 illegal, inequitable and unconscionable. Complaint, ¶ 13, p. 7.
- 13 • Defendants expressly prohibit their employees from disclosing their wages to fellow
employees. Complaint, ¶ 13, p. 9.

14 **III. LEGAL ARGUMENT**

15 **A. RELEVANT LEGAL STANDARD**

16 A demurrer tests the sufficiency of a complaint, i.e., whether the complaint states facts
17 sufficient to constitute a cause of action upon which relief may be based. Kong v. City of
18 Hawaiian Gardens Redevelopment Agency, 108 Cal. App. 4th 1028, 1037 (2002), citing Cal. Civ.
19 Proc. Code § 430.10(e); Friedland v. City of Long Beach, 62 Cal. App. 4th 835, 841-42 (1998). In
20 determining whether the complaint states facts sufficient to constitute a cause of action, the trial
21 court may consider all well-pled material facts pleaded in the complaint and those arising by
22 reasonable implication. Kong, 108 Cal. App. 4th at 1037; Doheny Park Terrace Homeowners
23 Assn., Inc. v. Truck Ins. Exchange, 132 Cal. App. 4th 1076, 1096 (2005). The court may not
24 consider contentions, deductions or conclusions of fact or law. Kong, 108 Cal. App. 4th at 1037
25 citing Moore v. Conliffe, 7 Cal. 4th 634, 638 (1994); Montclair Parkowners Assn. v. City of
26 Montclair, 76 Cal. App. 4th 784, 790 (1999).

27 //

1 A demurrer also lies where the pleading is “uncertain,” *i.e.*, when it is ambiguous or
 2 unintelligible. Cal. Civ. Proc. Code § 430.10(f). “[I]n pleading, the essential facts upon which a
 3 determination of the controversy depends should be stated with clearness and precision so that
 4 nothing is left to surmise. Those recitals, references to, or allegations of material facts which are
 5 left to surmise are subject to special demurrer for uncertainty.” Ankeny v. Lockheed Missiles &
 6 Space Co., 88 Cal. App. 3d 531, 537 (1979).

7 A court may sustain a demurrer without leave to amend if it reasonably appears that the
 8 complaint does not state factual allegations sufficient to support a cause of action, and that no
 9 amendment will cure the defects. See Tyco Indus. v. Superior Court, 164 Cal. App. 3d 148 (1984).

10 **B. THE DEMURRER TO THE FIRST CAUSE OF ACTION FOR FRAUD**
 11 **SHOULD BE SUSTAINED BECAUSE IT IS NOT PLED WITH THE**
 12 **REQUISITE PARTICULARITY.**

13 Plaintiffs’ first cause of action for fraud fails because Plaintiffs do not allege facts
 14 constituting the alleged fraud with sufficient particularity to withstand demurrer under California
 15 law.

16 In California, “fraud must be pled specifically; general and conclusory allegations do not
 17 suffice.” Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal. 4th 979, 993 (2004), citing Lazar v.
 18 Superior Court, 12 Cal. 4th 631, 645 (1996). This particularity requirement necessitates pleading
 19 facts which “show how, when, where, to whom, and by what means the representations were
 20 tendered.” Lazar at 645, citing Stansfield v. Starkey, 220 Cal. App. 3d 59, 73 (1990).

21 Plaintiffs’ actual descriptions fall far short of the specificity required to plead a valid fraud
 22 claim. Plaintiffs offer only cursory general allegations, which fail to provide the facts required for
 23 fraud allegations.

24 The following facts are alleged on behalf of *all* Plaintiffs:

- 25 • Polo misrepresented to Plaintiffs “the wages they will be paid while working at
 26 Defendants’ stores.” Complaint, ¶ 70(a).
- 27 • Polo promised their employees that “their base rate of pay, computed as the
 28 employees’ hourly pay rate times the hours actually worked, would serve as a
 guaranteed minimum wage payment,” and that while employees “may earn
 additional wages by selling more products, they will never be paid less than their
 base rate of pay.” Complaint, ¶ 70(a).

- Polo misrepresented to Plaintiffs that “they will perform an end-of-the-year wage reconciliation and pay premium overtime wages” and that Polo “will properly record their employees’ time and pay all wages due in a timely manner.” Complaint, ¶ 70(b).
- Polo misrepresented that employees “will be provided rest breaks in compliance with California law.” Complaint, ¶ 70(c).
- When Plaintiffs “began working for Defendants,” Tin Hua, General Manager, told Plaintiffs that they would “be compensated as a draw versus commission employee”. Complaint, ¶¶ 16 (Plaintiff Otsuka), 26 (Plaintiff Phipps), 37 (Plaintiff Kiser), and 47 (Plaintiff Keefe).
- Plaintiffs were told that their wages would increase as they increased their sales. Complaint, ¶¶ 16 (Plaintiff Otsuka), 26 (Plaintiff Phipps), 37 (Plaintiff Kiser), and 47 (Plaintiff Keefe).

The individual Plaintiffs alleged certain facts, specific to each Plaintiff, in addition to the general allegations set forth above. The following facts are alleged on behalf of **Plaintiff Otsuka**:

- Otsuka was told that she “would receive greater compensation for sales made in excess of her target sales goals, based on a commission rate of 8% of sales.” Complaint, ¶ 16.
- Otsuka was told that “her base rate, based on her hourly wage multiplied by the total hours she worked, would serve as a guaranteed wage payment.” Complaint, ¶ 16.
- Otsuka was “promised healthcare insurance after she worked for 90 days.” Complaint, ¶ 17.

The following facts are alleged on behalf of **Plaintiff Phipps**:

- Phipps was told that her “hourly rate would constitute a base guaranteed wage.” Complaint, ¶ 26.
- Phipps was “promised healthcare insurance after she worked for 90 days.” Complaint, ¶ 27.

The following facts are alleged on behalf of **Plaintiff Kiser**:

- Kiser was told that his “hourly rate would constitute a base guaranteed wage.” Complaint, ¶ 37.

The following facts are alleged on behalf of **Plaintiff Keefe**:

- Keefe was told that her “hourly rate would constitute a base guaranteed wage.” Complaint, ¶ 47.
- Keefe was “promised healthcare insurance after she worked for 90 days.” Complaint, ¶ 48.

//

1 The above general allegations are insufficient as a matter of law to plead a cause of action
 2 for fraud because the allegations are not pled with the requisite particularity. Plaintiffs fail to
 3 provide basic information about the alleged false statements and misrepresentations, including:

4 **WHO:** Plaintiffs frequently allege that "Defendants" made misrepresentations,
 5 without indicating the person who made such statements.

6 **WHEN:** Plaintiffs fail to indicate precisely when each alleged false statement was
 7 made. Plaintiffs only offer a vague time frame such as "when [Plaintiff]
 8 began working for Defendants". Such a description fails to provide
 9 sufficient information for Polo to investigate when Plaintiffs were given
 10 allegedly false information.

11 **WHERE:** Plaintiffs do not identify where the alleged false representations were made.

12 **HOW:** Plaintiffs fail to describe the means by which Polo made allegedly false
 13 statements; i.e., the context of the representations and whether those
 14 representations were oral, written or a combination of both.

15 As the claims are currently pled, Plaintiffs have not provided enough detail to enable Polo
 16 or the Court to assess whether the alleged statements constitute fraud. See Goldrich v. Natural Y
 17 Surgical Specialties, Inc., 25 Cal. App. 4th 772 (1994) ("Even in a case involving numerous oft-
 18 repeated misrepresentations, the plaintiff must, at a minimum, set out a representative selection of
 19 the alleged misrepresentations sufficient to permit the trial court to ascertain whether the
 20 statements were material or otherwise actionable." Id. at 783, citing Committee on Children's
 21 Television, Inc., 35 Cal. 3d 197 at 218).

22 "To withstand a demurrer, the facts constituting every element of the fraud must be alleged
 23 with particularity, and the claim cannot be salvaged by references to the general policy favoring the
 24 liberal construction of pleadings." Goldrich, 25 Cal. App. 4th at 782-783 (emphasis added).

25 In the present case, the Complaint does not sufficiently state the facts necessary to properly
 26 allege fraud. Thus, Polo's demurrer to Plaintiffs' first cause of action for fraud should be
 27 sustained.

C. PLAINTIFFS' SECOND CAUSE OF ACTION FOR FALSE IMPRISONMENT SHOULD BE SUSTAINED BECAUSE IT IS BARRED BY THE STATUTE OF LIMITATIONS AND PLAINTIFFS' COMPLAINT FAILS TO ALLEGE SUFFICIENT FACTS SUPPORTING THEIR CLAIMS.

Plaintiffs have alleged that Polo falsely imprisoned Plaintiffs because Polo allegedly requires employees at the end of their shifts to stand in line and/or remain in their locked stores, for up to one half hour, to undergo a loss prevention search by managers after the employees have clocked out. Complaint, ¶ 13, pp. 5-6. For the reasons set forth below, Polo's demurrer should be sustained.

1. The Claim of False Imprisonment By Plaintiffs Otsuka, Phipps and Keefe Should Be Dismissed Since These Claims Are Barred By the Statute of Limitations.

As a preliminary matter, Plaintiffs' cause of action for false imprisonment as to Plaintiffs Otsuka, Phipps and Keefe is time barred under Code of Civil Procedure section 340(c). Under this provision, an action for false imprisonment must be pled within one year after the cause of action arose. Code Civ. Proc. § 340(c); Kaufman v. Brown, 93 Cal. App. 2d 508 (1949). Since Plaintiffs' Complaint was filed on May 30, 2006, a cause of action for false imprisonment must have arisen no sooner than May 30, 2005. Since, as Plaintiffs allege, Otsuka terminated her employment with Polo in or about November 2004 (Complaint ¶ 1), Phipps in or about December 2004 (Complaint ¶ 2), and Keefe in or about December 2004 (Complaint ¶ 4), the cause of action for false imprisonment as to these Plaintiffs is time-barred by the statute of limitations imposed by section 340(c). Accordingly, the Demurrer as to Plaintiffs' second cause of action should be sustained as to Plaintiffs Otsuka, Phipps and Keefe.

2. The Demurrer Should Be Sustained Since Plaintiffs Have Pled That They Consented to Loss Prevention Searches

Since Plaintiffs have pled that they consented to the inspection of their shopping bags, briefcases, totes, handbags or other items ("loss prevention searches") by Polo, Plaintiffs' Complaint fails to allege facts that support their cause of action for false imprisonment. False imprisonment is "the unlawful violation of the personal liberty of another." Pen. Code, § 236. To properly plead a cause of action for false imprisonment, Plaintiffs must show: (1) the

1 nonconsensual, intentional confinement of a person; (2) without lawful privilege, and (3) for an
2 appreciable period of time, however brief. Fermino v. Fedco, Inc. (1994) 7 Cal.4th 701, 715. For the
3 reasons that will be discussed below, Polo's demurrer should be sustained as to this cause of action
4 because Plaintiffs are unable to show that they were intentionally confined without their consent.

5 Here, Plaintiffs specifically pled that they "were warned in Defendants' Retail Employee
6 Handbook at page 26, that all packages and bags are subject to inspection before the employee may
7 exit the store, and that this requirement is 'a condition of employment.'" (Complaint at ¶13, pp
8 6:13-16.) By becoming employees of Polo, Plaintiffs consented to this particular condition of
9 employment. Accordingly, "loss prevention searches" is an explicit condition of employment for
10 which Plaintiffs provided their consent. Loss prevention searches —without more—cannot form
11 the basis of a false imprisonment claim. Plaintiffs' own factual allegations show that they
12 consented to loss prevention searches.

13 **3. Plaintiffs' False Imprisonment Cause Of Action Is Barred By The**
14 **Exclusive Remedy Provisions Of The Workers' Compensation Law**

15 Plaintiffs' cause of action for false imprisonment is further barred by the exclusivity
16 provisions of the Workers' Compensation Act ("exclusivity provisions")(Lab. Code §§ 3600,
17 3602). Since Plaintiffs' factual allegations do not amount to false imprisonment, as discussed
18 above, because Plaintiffs consented to "loss prevention searches" as a condition of their
19 employment, the "loss prevention searches" are therefore part of the compensation bargain and are
20 barred from being actionable under the exclusivity provisions of the Workers' Compensation Act.

21 Under Labor Code section 3600(a), workers' compensation liability exists "in lieu of any
22 other liability whatsoever" against any employer for injury sustained by its employees "arising out
23 of and in the course of employment." Lab. Code § 3600(a). "[T]he basis for the exclusivity rule in
24 workers' compensation law is the 'presumed' 'compensation bargain,' pursuant to which the
25 employer assumes liability for industrial personal injury or death without regard to fault in
26 exchange for limitations on the amount of that liability. Fermino, 7 Cal.4th at 708. The very issue
27 of whether the exclusivity provisions of the Workers' Compensation Act barred an employee's
28 civil action for false imprisonment was the subject of Fermino v. Fedco, *supra*.

1 In Fermino, the plaintiff brought an action for false imprisonment against defendant
2 employer. The plaintiff alleged that she was falsely imprisoned when she was interrogated in a
3 windowless room at work, where she was accused of stealing. Plaintiff employee made allegations
4 that she was kept in the room against her will for more than an hour and was released only when
5 she became hysterical. In determining whether an action for false imprisonment is barred by the
6 exclusivity provisions, the court found that reasonable attempts to investigate an employee for
7 theft, including interrogation, are a normal part of the employment relationship and entitled to the
8 protection of the exclusivity provisions. Id. at 717. However, actions by an employer that go
9 beyond the bounds of reasonable interrogations and detention, such that the actions amount to false
10 imprisonment, are not entitled to protection under the exclusivity provisions. Id. Accordingly, the
11 court found that once it is determined that false imprisonment has taken place, the action of the
12 employer "cannot be said to be a normal aspect of the employment relationship" and therefore is
13 "always outside the scope of the compensation bargain." Id. at 723.

14 Whereas here, Plaintiffs have failed to allege facts supporting their cause of action for false
15 imprisonment since they allege facts showing their consent to Polo's "loss prevention searches"
16 and since they fail to allege facts that show that Polo's loss prevention searches were done outside
17 the scope of a reasonable attempt to investigate employee theft as part of a normal course of the
18 employment relationship, the exclusivity provisions remain in effect and bar Plaintiffs' cause of
19 action for false imprisonment.

20 Accordingly, Plaintiffs' cause of action for false imprisonment is not sufficiently pled and
21 Polo's demurrer should be sustained.

22 **D. THE DEMURRER TO THE SEVENTH, EIGHTH, AND THIRTEENTH**
23 **CAUSES OF ACTION FOR VIOLATIONS OF LABOR CODE SECTIONS**
24 **226.7, 226, AND 2699 SHOULD BE SUSTAINED AS TO PLAINTIFFS**
25 **OTSUKA, PHIPPS AND KEEFE BECAUSE EACH OF THESE ALLEGED**
26 **STATUTORY VIOLATIONS HAS A ONE-YEAR STATUTE OF**
27 **LIMITATIONS.**

28 Polo demurs to the Seventh, Eighth and Thirteenth Causes of Action because the claims are
precluded by California's one-year statute of limitations for actions seeking penalties. California

Code of Civil Procedure § 340(a) provides a *one-year* statute of limitations for “an action upon a statute for a penalty or a forfeiture, if the action is given to an individual, or to an individual and the state[.]” Any liability constituting a penalty is unambiguously excepted from the three-year statute of limitations period of Code of Civil Procedure § 338, subdivision (a), which applies to “[a]n action upon a liability created by statute, *other than a penalty or forfeiture.*” (emphasis added.)

In this instance, Plaintiffs allege certain California Labor Code violations which subject Polo to penalties and are therefore subject to the one-year statute of limitations set forth under California Code of Civil Procedure § 340.

1. Labor Code Section 226.7

California Labor Code § 226.7 creates a penalty to which the one-year limitations period of Code of Civil Procedure § 340(a), applies. Labor Code § 226.7 provides:

(b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee’s regular rate of compensation for each work day that the meal or rest period is not provided.

Cal Lab Code § 226.7.

Any payments made under this section are not an employee benefit given for labor performed, but instead are a sanction or punishment for failure to provide work accommodations such as adequate meal breaks.¹ Because Labor Code § 226.7 reflects a penalty for statute of limitations purposes, the one-year limitations period applies, and Plaintiffs failed to bring this action within one year.

2. Labor Code Section 2699

Plaintiffs have asserted that they intend to serve as private attorneys general under the California Private Attorneys General Act of 2004 (“PAG Act”), Labor Code §§ 2699 *et seq.* Labor Code § 2699 provides:

¹ Several California cases in the last decade have held that payments made under Labor Code § 226.7 are penalties; however, the California Supreme Court granted review of this issue on February 22, 2006. See Murphy v. Kenneth Cole Productions, 130 P.3d 519, 40 Cal. Rptr. 3d 750 (2006).

(a) Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a *civil action brought by an aggrieved employee* on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.

Cal Lab Code § 2699 (emphasis added). This statute provides that Plaintiffs can step into the state agency's shoes and sue to recover penalties owed by an employer. Such penalties are split with the state following recovery.

The Act allows employees to sue employers directly for civil penalties for purported Labor Code violations. As courts have recognized, "the PAG Act empowers or deputizes an aggrieved employee to sue for *civil penalties* 'on behalf of himself or herself and other current or former employees'". Dunlap v. Superior Court, 142 Cal. App. 4th 330, 337 (2006) (emphasis added). The statute's legislative history indicates that the PAC Act provides for recovery of penalties:

The Legislature declared its intent as follows: "(c) Staffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail to keep up with the growth of the labor market in the future. [P] (d) It is therefore in the public interest to provide that *civil penalties* for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general, while also ensuring that state labor law enforcement agencies' enforcement actions have primacy over any private enforcement efforts undertaken pursuant to this act." (Stats. 2003, ch. 906, § 1.)

Dunlap, 142 Cal. App. 4th at 337 (2006) (emphasis added).

Plaintiffs have indicated in the Complaint that they are seeking penalties. Complaint, ¶ 160 (Plaintiffs are entitled "to seek and collect statutory penalties available under the Private Attorneys General Act and on behalf of the State of California"). Accordingly, such claims fall within the one-year statute of limitations under Cal. Code Civ. Proc. §340(a).

3. Labor Code Section 226

Labor Code § 226 provides that a failure by an employer to permit a current or former employee to inspect or copy records as set forth in the section "entitles the current or former employee or the Labor Commissioner to recover a seven-hundred-fifty-dollar (\$750) penalty from

1 the employer.” Cal Lab Code § 226(f). An employee “may also bring an action for injunctive
2 relief to ensure compliance with this section”.

3 Courts have discussed the general characteristics of a penalty. In considering a statute that
4 reduced a court reporter’s compensation by one-half when a transcript was late, the court in County
5 of San Diego v. Milotz, 46 Cal.2d 761 (1956), stated:

6 The term “penalty” has a very comprehensive meaning. While often used as
7 synonymous with the word “punishment,” or as including a sum payable upon the
8 breach of a private contract, it has also the more restricted meaning of a sum of
9 money made payable by way of punishment for the nonperformance of an act or for
10 the performance of an unlawful act, and which, in the former case, stands in lieu of
11 the act to be performed.

12 Id. at 766.

13 Causes of action “based upon statutes which provide for mandatory recovery of
14 damages additional to actual losses incurred, such as treble damages, are considered penal
15 in nature, and thus are governed by the one-year limitations period under section 340,
16 subdivision (1).” Menefee v. Ostawari, 228 Cal. App. 3d 239, 243 (1991). The statutory
17 penalty in Code of Civil Procedure section 340:

18 is one which an individual is allowed to recover against a wrong-doer, as a
19 satisfaction for the wrong or injury suffered, and without reference to the actual
20 damage sustained, or one which is given to the individual and the state as a
21 punishment for some act which is in the nature of a public wrong.

22 County of Los Angeles v. Ballerino, 99 Cal. 593, 596 (1893). The foregoing cases indicate
23 that a statute like Labor Code § 226 that imposes a payment without regard to the actual
24 loss suffered is in the nature of a penalty.

25 Even Plaintiffs have indicated they are seeking *penalties* for violation of Labor Code § 226.
26 Complaint, ¶ 111 (“Plaintiffs and Class members are entitled to penalties and attorneys’ fees
27 pursuant to Labor Code § 111 and California Code of Civil Procedure § 1021.5.”) Accordingly,
28 because only penalties are sought, this cause of action is subject to the one-year statute of
limitations.

Since Plaintiffs’ Complaint was filed on May 30, 2006, the Seventh, Eighth and Thirteenth
Causes of Action must have arisen no earlier than May 30, 2005. Plaintiffs allege that Otsuka

1 terminated her employment with Polo in or about November 2004 (Complaint, ¶ 1), Phipps in or
 2 about December 2004 (Complaint, ¶ 2), and Keefe in or about December 2004 (Complaint, ¶ 4).
 3 These causes of action are time-barred by California's one-year statute of limitations for actions
 4 seeking penalties. Accordingly, Polo's Demurrer to the Seventh, Eighth and Thirteenth Causes of
 5 Action should be sustained as to Plaintiffs Otsuka, Phipps and Keefe.

6 E. **THE DEMURRER TO THE ELEVENTH CAUSE OF ACTION FOR UNJUST**
 7 **ENRICHMENT SHOULD BE SUSTAINED BECAUSE UNJUST**
 8 **ENRICHMENT IS NOT A CAUSE OF ACTION.**

9 Polo hereby demurs to Plaintiffs' eleventh cause of action for unjust enrichment on the
 10 ground that unjust enrichment is not a cause of action. Courts have recognized that a claim for
 11 unjust enrichment is, in effect, a claim for an award of restitution:

12 The first cause of action is labeled as one for "unjust enrichment."
 13 Unjust enrichment is not a cause of action, however, or even a
 14 remedy, but rather " "a general principle, underlying various legal
 15 doctrines and remedies" " . . . [Citation.] It is synonymous with
 16 restitution. [Citation.]"

17 McBride v. Boughton, 123 Cal.App.4th 379, 387 (2004), citing Melchior v. New Line Productions,
 18 Inc. 106 Cal.App.4th 779, 793 (2003).

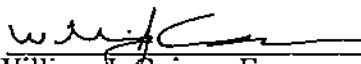
19 Because unjust enrichment is not a cause of action, Polo's demurrer should be sustained.

20 IV. **CONCLUSION**

21 For the reasons stated above, Polo respectfully requests that the Court sustain its demurrer.

22 Dated: October 12, 2006

23 GREENBERG TRAURIG, LLP

24 By 
 25 William J. Goines, Esq.
 26 Jeremy A. Meier, Esq.
 27 Karen Rosenthal, Esq.
 28 Alisha M. Louie, Esq.

Attorneys for Defendants Polo Ralph Lauren
 Corporation; Polo Retail, LLC; Fashions Outlet of
 America, Inc.; and Polo Retail Corporation

Otsuka, et al. v. Polo Ralph Lauren Corporation, et al.

Case No. CGC-06-452655

PROOF OF SERVICE

I, Cathy Sandifer, am a citizen of the United States, over the age of eighteen years and not a party to the within action. I am an employee of GREENBERG TRAURIG, LLP, and my business address is 1900 University Avenue, Fifth Floor, East Palo Alto, CA 94303. On October 12, 2006, I served the following documents:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' DEMURRER TO FIRST AMENDED COMPLAINT

☐ by transmitting via **FACSIMILE** the document(s) listed above to the fax numbers) set forth below, or as stated on the attached service list, on this date at approximately _____, from the sending facsimile machine telephone number of 650-289-7893. The transmission was reported as complete and without error by the machine. Pursuant to California Rules of Court, Rule 2008(e)(4), I caused the machine to print a transmission record of the transmission, a copy of which is attached to the original of this declaration. The transmission report was properly issued by the transmitting facsimile machine.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the **UNITED STATES MAIL** at East Palo Alto, California, addressed as set forth below.

☐ by **OVERNIGHT MAIL** by placing the document(s) listed above in a sealed overnight mail envelope with postage thereon fully prepaid, addressed as set forth below. I am aware that on motion of the party served, service is presumed invalid if delivery by Federal Express is more than one day after date of deposit with Federal Express.

☐ **(BY MESSENGER PERSONAL SERVICE)**. I caused delivery of such envelope by hand to the offices of the addressee.

Patrick R. Kitchin, Esq.
Law Offices of Patrick R. Kitchin
565 Commercial St., 4th Fl.
San Francisco, CA 94111
(Fax: 415-627-9076)

Daniel Feder, Esq.
Law Offices of Daniel L. Feder
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San Francisco, CA 94133
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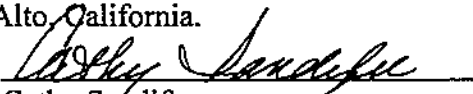
I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings and notices for mailing with United States Postal Service/Express Mail, Federal Express and other overnight mail services. The foregoing sealed envelope was placed for collection and mailing this date consistent with the ordinary business practice of my place of employment, so that it will be picked up this date with postage thereon fully prepaid at East Palo Alto, California, in the ordinary course of such business.

//

//

1 I declare under penalty of perjury under the laws of the State of California that the foregoing is
2 true and correct.

3 Executed on October 12, 2006, at East Palo Alto, California.

4 
Cathy Sandifer

1 WILLIAM J. GOINES (SBN 061290)
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2 KAREN ROSENTHAL (SBN 209419)
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8 Attorneys for Defendants Polo Ralph Lauren
Corporation; Polo Retail, LLC; Fashions Outlet
9 of America, Inc.; and Polo Retail Corporation

10
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **FOR THE COUNTY OF SAN FRANCISCO**
13

14 ANN OTSUKA, an individual; JANIS KEEFE,
15 an individual; CORINNE PHIPPS, an
individual; and JUSTIN KISER, an individual;
16 and on behalf of all other similarly situated,

17 Plaintiff(s),

18 v.

19 POLO RALPH LAUREN CORPORATION, a
Delaware Corporation; POLO RETAIL, LLC, a
20 Delaware Corporation; POLO RALPH
LAUREN CORPORATION, a Delaware
21 Corporation, doing business in California as
POLO RETAIL CORP; FASHIONS OUTLET
22 OF AMERICA, INC., a Delaware Corporation
and DOES 1-500, inclusive,

23 Defendant(s)..
24
25

Case No. CGC-06-452655

**[PROPOSED] ORDER RE:
DEFENDANTS' DEMURRER TO FIRST
AMENDED COMPLAINT**

BY FAX

Date Filed: May 30, 2006

26 The Demurrer of Defendants Polo Ralph Lauren Corporation; Polo Retail, LLC; Fashions
27 Outlet of America, Inc.; and Polo Retail Corporation (collectively referred to herein as
28

1 “Defendants” or “Polo”) to the First Amended Complaint (“Complaint”) of Plaintiffs Ann Otsuka,
2 an individual; Janis Keefe, an individual; Corinne Phipps, an individual; and Justin Kiser, an
3 individual; and on behalf of all other similarly situated (collectively referred to herein as
4 “Plaintiffs”), having come on regularly for hearing before this court on November 15, 2006, and
5 the pleadings and oral arguments having been considered by the court, and good cause appearing
6 therefore,

7 IT IS HEREBY ORDERED as follows:

8 1. Polo’s Demurrer to the First Cause of Action to the Complaint is sustained without
9 leave to amend. The First Cause of Action for Fraud fails to state facts sufficient to constitute a
10 cause of action against Defendants under Code of Civil Procedure § 430.10(e).

11 2. Polo’s Demurrer to the Second Cause of Action to the Complaint is sustained
12 without leave to amend. The Second Cause of Action for False Imprisonment fails to state facts
13 sufficient to constitute a cause of action against Defendants under Code of Civil Procedure
14 § 430.10(e).

15 3. [Alternatively,] Polo’s Demurrer to the Second Cause of Action to the Complaint is
16 sustained without leave to amend with respect to Plaintiffs Otsuka, Phipps and Keefe. Claims by
17 Plaintiffs Otsuka, Phipps and Keefe are time-barred by the one-year statute of limitations set forth
18 in California Code of Civil Procedure § 340(a).

19 4. Polo’s Demurrer to the Seventh Cause of Action to the Complaint is sustained
20 without leave to amend with respect to Plaintiffs Otsuka, Phipps and Keefe. Claims by Plaintiffs
21 Otsuka, Phipps and Keefe are time-barred by the one-year statute of limitations set forth in
22 California Code of Civil Procedure § 340(a).

23 5. Polo’s Demurrer to the Eighth Cause of Action to the Complaint is sustained
24 without leave to amend with respect to Plaintiffs Otsuka, Phipps and Keefe. Claims by Plaintiffs
25 Otsuka, Phipps and Keefe are time-barred by the one-year statute of limitations set forth in
26 California Code of Civil Procedure § 340(a).

27 //

6. Polo's Demurrer to the Eleventh Cause of Action to the Complaint is sustained without leave to amend. The Eleventh Cause of Action for Unjust Enrichment fails to state facts sufficient to constitute a cause of action against Defendants under Code of Civil Procedure § 430.10(e).

7. Polo's Demurrer to the Thirteenth Cause of Action to the Complaint is sustained without leave to amend with respect to Plaintiffs Otsuka, Phipps and Keefe. Claims by Plaintiffs Otsuka, Phipps and Keefe are time-barred by the one-year statute of limitations set forth in California Code of Civil Procedure § 340(a).

Dated: _____, 2006.

Judge of the Superior Court

Otsuka, et al. v. Polo Ralph Lauren Corporation, et al.

Case No. CGC-06-452655

PROOF OF SERVICE

I, Cathy Sandifer, am a citizen of the United States, over the age of eighteen years and not a party to the within action. I am an employee of GREENBERG TRAURIG, LLP, and my business address is 1900 University Avenue, Fifth Floor, East Palo Alto, CA 94303. On October 12, 2006, I served the following documents:

[PROPOSED] ORDER RE: DEFENDANTS' DEMURRER TO FIRST AMENDED COMPLAINT

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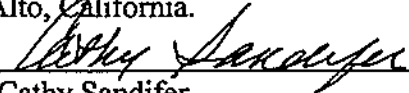
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1 I declare under penalty of perjury under the laws of the State of California that the foregoing is
2 true and correct.

3 Executed on October 12, 2006, at East Palo Alto, California.

4 
Cathy Sandifer